STATE OF MICHIGAN

COURT OF APPEALS

RONALD VOELKER, SHARLOTTE VOELKER, and SHYRA VOELKER,

Plaintiffs-Appellants,

v

HOME OFFICE REALTY,

Defendant,

and

PROVIDENCE MORTGAGE, and LEN J. BURNS,

Defendants-Appellees

UNPUBLISHED
September 16, 2010

No. 291539
Genesee Circuit Court
LC No. 08-088417-NO

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs, Ronald and Sharlotte Voelker and their daughter Shyra Voelker, appeal as right the trial court's opinion and order granting summary disposition in favor of defendants, Providence Mortgage and Len J. Burns, in this breach of duty action. Because plaintiffs cannot establish a question of fact regarding whether defendants owed a duty to plaintiffs, we affirm.

This case arises from Ronald and Sharlotte Voelker's purchase of a home at 8070 Morrish Road in Swartz Creek on November 15, 2004. Plaintiffs claim that they were never advised that the property is located approximately a quarter to a third of a mile from the Berlin & Farro waste dump. In April 2008, plaintiffs filed a complaint alleging that their family had experienced "tremendous health tragedies" as a result of Ronald being diagnosed with liver cancer and Shyra diagnosed with lymphoma. Plaintiffs claim that as a result of their health concerns, the Michigan Department of Environmental Quality (MDEQ) tested the well water at their home on January 31, 2008. Plaintiffs state that the MDEQ test showed the arsenic level in the well water to be .037 mg/l, which is three and a half times the legal limit. Plaintiffs allege in their complaint that "as a result of continuous drinking of and bathing in arsenic contaminated well water by the Plaintiffs, Ronald Voelker and Shyra Voelker have developed cancers." Plaintiffs also allege that the testing of the well water for arsenic at the time they bought their home was never done, suppressed, or not revealed to plaintiffs.

During the real estate transaction, plaintiffs claim that they "financed" the real estate transaction with Providence Mortgage and worked primarily with Burns, the principal Providence Mortgage employee handling the real estate transaction at 8070 Morrish Road. Plaintiffs claim that they were unsophisticated laypersons buying their first home and that it was their understanding that Providence Mortgage was their lender. Defendants claim that because plaintiffs qualified for a loan insured by the Federal Housing Administration (FHA), defendants merely acted as loan originators and assisted them in originating a loan package that would meet HUD/FHA requirements for an FHA-insured loan. Defendants assert that they were not an FHA direct endorsed lender and therefore only assembled a loan package that was forwarded to Community Mortgage Services for approval or disapproval.

Defendants claim that as part of putting together the loan package defendants contacted Lee Theile to perform a well test to meet FHA requirements that a well test be performed on homes with individual wells. Theile was an FHA approved water inspector. On October 22, 2004, Theile performed a well water and septic inspection including tests for fecal coli, e-coli, coliform, nitrates/nitrites, and lead. According to Theile, he did not test for arsenic in the well because that was not part of the FHA requirements. After Theile sent the results to defendants, defendants completed the loan package and forwarded it Community Mortgage Services for review, processing, and approval or disapproval. Community Mortgage Services, an approved FHA direct endorsed lender, approved the loan package and plaintiffs closed on November 15, 2004. Thereafter, plaintiffs moved into their new home and later, Ronald and Shyra developed cancers.

In their complaint, plaintiffs alleged that defendants had a duty to, but failed to, disclose the location of the toxic waste site prior to closing, failed to the deliver the results of an inspection plaintiffs paid for prior to closing, and failed to disclose that either the well water was not tested or what the results of the water testing were for arsenic prior to the closing.[1] Defendants filed a motion for summary disposition arguing that as a loan originator facilitating financing for the real estate transaction no relationship existed from which a duty to plaintiffs existed regarding testing the well for arsenic. The trial court agreed and granted defendants' motion for summary disposition reasoning as follows:

> As a threshold observation, if Providence cannot be classified as a "lender", they owe no duty to Plaintiff and summary disposition is warranted. On this threshold point, the Court has difficulty characterizing Providence as a lender, for a number of reasons. First, the record indicated Providence lent no money to Plaintiffs. Second, another clearly identifiable entity, Community Mortgages Services, Inc. (CMS) actually provided the financing to Plaintiffs and therefore were the "lenders." Third, Providence was a mortgage loan originator and even

[1] Plaintiffs alleged the same claims against both Home Office Realty, Real Estate One – Hartland, and Lee Theile (the inspector who performed the water test on plaintiffs' well prior to closing) in their complaint in the lower court. All claims against these parties were dismissed—Theile as a result of the bankruptcy process, and the others on summary disposition in the lower court. None of these parties are a party to this appeal.

> by FHA and HUD standards was not a lender. Indeed providence was characterized as an FHA sponsored lender not an FHA Direct-Endorsed Lender for financing. Simply put, Providence could facilitate loans not make them under the auspices of the FHA or HUD. Accordingly,[1] on the salient question presented, Providence was not a lender for liability purposes. Moreover, the relationship Providence had with Plaintiffs, as a loan originator, does not establish a duty on the part of Providence to test for arsenic levels in the water.
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> [1] This conclusion is not undermined by Plaintiffs' contentions that, because Providence is listed as a lender in various documents, Providence must be characterized as a lender for the present purposes. The inescapable fact remains: Providence did not lend money.

It is from this order that plaintiffs now appeal as of right.

Plaintiffs first argue that the trial court improperly granted defendants' motion for summary disposition based on the fact that according to defendants they were not the lender in the transaction. Defendants respond that they were not the lender in the transaction and thus they did not owe a duty to plaintiffs to test the well water for arsenic. We review motions for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion brought pursuant to MCR 2.116(C)(10) tests a claim's factual support. "In reviewing a motion under . . . (C)(10) this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition may be granted under MCR 2.116(C)(10) when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

Plaintiffs claim that it is undisputed that the transaction involved was an FHA transaction. Defendants do not challenge this factual assertion. As such, plaintiffs assert that a duty is created via FHA Mortgagee letter 95-34, July 27, 1995, and that a fair reading of the letter indicates that it applies to both originators and lenders that are part of an FHA financed transaction. The letter states in part:

> Over the past several months, the Department met with representatives from the industry and the Environmental Protection Agency (EPA) regarding Mortgagee Letter 94-36. With their assistance and cooperation, procedures for testing well water have been revised and simplified. These procedures reflect monitoring for acute contaminants, lead and, if of local concern, other contaminants.
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> As the majority of on-site well and septic system inspections will be performed through a Direct Endorsement lender, engineer qualifications should be verified by individual lenders. Lender compliance will be determined during normal mortgagee monitoring activities.

Contrary to plaintiffs' assertions, the plain language of the letter clearly applies to lenders and not to loan originators. The letter never once refers to loan originators but it does clearly state that lenders must comply with the testing requirements outlined in the letter. We have reviewed the record and plaintiffs have provided no evidence that defendants were the lenders in this transaction. There is no evidence that defendants were an approved FHA direct endorsed lender, and further, there is no evidence that defendants ever loaned any money to plaintiffs. To the contrary, there is evidence in the record that Community Mortgage Services, an approved FHA direct endorsed lender, did in fact provide funds to plaintiffs to purchase the property. Based on this record, we conclude that the trial court properly granted summary disposition in favor of defendants based on the fact that they were not the lenders in this HUD/FHA mortgage transaction.

Other than FHA Mortgagee letter 95-34, July 27, 1995, plaintiffs allege no other relationship with defendants that created a duty to test the well for arsenic as part of the loan process in Michigan. Solely applying Michigan law, even if we were to characterize defendants as "lenders" rather than "loan originators," plaintiffs' breach of duty argument is still fundamentally flawed. This Court has specifically held in *Metheny v Coy-Magee Custom Builder, Inc*, 121 Mich App 580, 583; 329 NW2d 428 (1982), that a "lender has no affirmative duty as part of the mortgage loan process to test the quality of the water supply." Identical to *Metheny*, "[p]laintiffs cite no authority supporting their claim that defendant[s] had an affirmative duty to undertake a water analysis or that defendant[s] had a duty to disclose the contamination to plaintiff if it was aware of it." For these reasons, we conclude that the trial court properly granted defendants' motion for summary disposition.

Plaintiffs also argue that whether HUD requires testing for arsenic under the terms and intent of FHA Mortgagee letter 95-34, July 27, 1995, is a question that creates a genuine issue of fact for the jury. Plaintiffs allege that the well water should have been tested for arsenic because arsenic was of "local concern" in Gaines Township. Accordingly, plaintiffs contend that whether arsenic was of "local concern" in Gaines Township under the language of FHA Mortgagee letter 95-34, July 27, 1995 is a question of fact that remains for the jury. Plaintiffs rely on the following language from FHA Mortgagee letter 95-34, July 27, 1995:

> Well water must be tested in accordance with the latest local and State drinking water regulation for private wells. This includes all microbiological and chemical test parameters in the regulation. If there are no local or adequate State requirements and standards for private wells, then water quality must be tested for lead and acute contaminants, including nitrates/nitrites and microbial contaminants such as total and fecal coliform *and, if of local concern, other contaminants*. . . . [Emphasis added.]

Defendants assert that as loan originators, and not lenders, they had no duty to interpret the letter and determine what well water contaminants may have been of "local concern" in Gaines Township or Genesee County. Defendants state that they hired Lee Theile, an FHA approved well inspector, to test the well for the appropriate contaminants as part of assembling plaintiffs' loan application package. The record reveals that Theile tested the well for the following contaminants: fecal coli, e-coli, coliform, nitrates/nitrites, and lead. When asked why he tested only those contaminants, Theile testified in his deposition as follows:

> Because the lenders or the real estate people would always tell us what they needed tested on the property and that's why we did that. We did what we were asked to do by the lenders or the real estate individuals or a person, in general. At that time, as I remembered it, the FHA had updated some of their qualifications for testing. They used to just ask for coliform, nitrite, and nitrates. Some asked for lead, some didn't. It would depend on the lender and where it was going. Arsenic was not a requirement at that time. I was never asked to test for arsenic. Only in Shiawassee County, which it was mandated into their criteria when you did a well and septic evaluation for real estate transactions.

After reviewing the record, we conclude that under the circumstances of this case, whether FHA Mortgagee letter 95-34, July 27, 1995, required arsenic testing on this particular property is of no consequence in the instant case because the letter does not apply to defendants who were not lenders and had no duty to interpret the letter's requirements. Furthermore, the record shows that defendants hired Theile, a local inspector with the proper FHA credentials, to perform the well test.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio